

September 7, 2012

By Hand Delivery and ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: KSQA(TV), Topeka, KS Facility ID No. 166546— Request for Waiver of PSIP
Channel Designation
KSQA, L.L.C., Complaint for Carriage, MB Docket No. 12-168, CSR-8659-M

Dear Ms. Dortch:

CoxCom, LLC, d/b/a Cox Communications Kansas, LLC (“**Cox**”), by its attorneys, hereby provides the following comments regarding the request of KSQA, L.L.C. (“KSQA”) for a waiver of Section 73.682(d) of the Commission’s rules, 47 C.F.R. § 73.682(d).¹ The requested waiver, if granted, would allow full-power digital television station KSQA(TV), Topeka, Kansas, to use its Radio Frequency (“**RF**”) channel as its major channel number, which the Commission’s rules require KSQA to transmit in its Program and System Information Protocol (“**PSIP**”). In this case, that would mean substituting RF Channel 12 for KSQA’s current PSIP (a/k/a “virtual”) Channel 22.

Cox takes no position on the ultimate question of whether the Commission should grant KSQA’s requested waiver. Inasmuch as KSQA apparently filed the PSIP Channel Change Request to retroactively influence the result in a pending mandatory carriage proceeding, however, and for the reasons described below, Cox requests that if the Commission grants the PSIP Channel Change Request, any change to KSQA’s PSIP designation be effective only prospectively, and that KSQA be granted no right to cable carriage on Channel 12 until the mandatory carriage period commencing January 1, 2015.

KSQA’s PSIP Channel Change Request apparently is designed solely to give KSQA the right to demand immediate cable carriage on Channel 12.² This request arises from a pending mandatory carriage dispute regarding whether KSQA is entitled to cable carriage on its RF Channel 12 rather than its PSIP Channel 22 in Cox’s cable system serving Topeka, Kansas.³ As

¹ See letter from James L. Winston, Counsel for KSQA, L.L.C., to Ms. Marlene H. Dortch, dated August 23, 2012 (the “**PSIP Channel Change Request**”). KSQA also filed the PSIP Channel Change Request as an attachment to a Motion for Leave to File Notice and Notice that KSQA submitted in MB Docket No. 12-168 and CSR-8659-M on August 23, 2012.

² See PSIP Channel Change Request at 4.

³ See KSQA, L.L.C., Licensee of television station KSQA, Channel 12, for Carriage of KSQA(TV), Topeka, Kansas, MB Docket No. 12-168, CSR-8659-M, filed June 12, 2012 (the

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KSQA admits, the station broadcasts on DTV RF Channel 12 and is assigned PSIP Channel 22.⁴ Despite the Commission's unambiguous and repeated holding that mandatory carriage broadcast stations are entitled to demand carriage on their PSIP channel — for KSQA, Channel 22⁵ — rather than their RF Channel, KSQA insists it is entitled to carriage on *either* Channel 12 or Channel 22, at its option.⁶ Although Cox and KSQA discussed carriage on various channel locations, including on Channel 22, KSQA refused carriage on any channel other than Channel 12.⁷ On June 12, 2012, KSQA filed a complaint against Cox demanding carriage on Channel 12, and the pleading cycle in that case is now closed. If the PSIP Channel Change Request is granted retroactively, the Commission's rules and the pending must-carry proceeding between Cox and KSQA will be moot.

As a general matter, Cox has no interest in the PSIP channels assigned to individual broadcasters. In this case, however, Cox objects to KSQA's effort to retroactively manipulate the outcome of the pending must-carry proceeding by attempting, at this late date, to have the Commission change the station's PSIP channel designation. KSQA's PSIP channel number has been a matter of public record for several years and has been recorded in Commission orders, KSQA applications to the Commission, every relevant Commission database, and publicly available third-party channel guides since 2006.⁸ Cox reasonably relied on these public records and KSQA representations in its negotiations with KSQA, and Cox currently carries Topeka CBS affiliate WIBW-TV on Channel 12 pursuant to a retransmission consent agreement. Cox would be required to relocate that station (and probably several others) if KSQA retroactively were to gain immediate must-carry rights for Channel 12.⁹

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“KSQA Complaint”). Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, a copy of this letter is being filed in MB Docket No. 12-168.

⁴ PSIP Channel Change Request at 2.

⁵ See Carriage of Digital Television Broadcast Signals, *First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598 para. 83 (2001); Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital television, *Report and Order*, 19 FCC Rcd 18279 at paras. 152-153 (2004) (“*Second DTV Report and Order*”); Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, *Declaratory Order*, 23 FCC Rcd 14254 at para. 16 (2008) (“*2008 Declaratory Order*”). Mandatory carriage broadcasters also have the right to demand historical channel positions not relevant here (*i.e.*, the cable channel position on which they were carried July 19, 1985 or January 1, 1992). See 47 U.S.C. § 534(b)(6).

⁶ See KSQA Complaint at 4-6; KSQA, L.L.C., Reply, MB Docket No. 12-168, CSR-8659-M, at 2-4, filed July 27, 2012.

⁷ See CoxCom, Inc., d/b/a Cox Communications Kansas, LLC, Opposition and Motion to Dismiss, MB Docket No. 12-168, CSR-8659-M, at 2, filed July 12, 2012. Cox offered to carry KSQA on Channel 10, which KSQA refused. See *id.*

⁸ See Cox Motion to Strike, Alternative Motion for Leave to File Supplemental Response, and Supplemental Response at 4-6 and instances cited therein.

⁹ Cox's interpretation of the Commission's rules and records was and is reasonable and should not subject it or its customers to the hardship of accommodating KSQA's channel positioning whims. See *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987) (“The
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Therefore, although Cox takes no position on whether the Commission should grant the PSIP Channel Change Request with respect to KSQA's future operations, Cox does object to the grant of an immediate or retrospective application of such a ruling. If KSQA wanted the right to demand mandatory carriage on Channel 12 for the current 2012-2015 election period, it should have requested a PSIP channel change in a timely fashion before the October 2011 election date applicable to the current mandatory carriage cycle. In light of the equities, to the extent the Commission elects to grant the PSIP Channel Change Request, it should become effective no earlier than January 1, 2015; *i.e.*, the Commission should not permit KSQA to retroactively justify its defective channel positioning demand for mandatory carriage on Channel 12. In the event the Request is granted, this phase-in period is necessary to ensure that KSQA is not rewarded for failing to seek the requested relief in a timely manner and to recognize Cox's reasonable reliance on KSQA's and the Commission's pronouncements regarding the station's correct PSIP channel.

KSQA has provided no compelling reason for the Commission to grant immediate relief that would interfere with the orderly disposition of KSQA's pending must-carry complaint or with the settled, legitimate expectations of Cox and its customers. The Commission has stated that it may grant requests for PSIP channel changes in "unique situations,"¹⁰ but such requests are not routinely granted.¹¹ KSQA's desire for cable carriage on Channel 12 is hardly the type of "unique situation" the Commission envisioned when it agreed to entertain PSIP channel change requests. KSQA argues that consumers will be confused if the station's PSIP channel does not match its RF channel,¹² but the station did not even begin broadcasting until September 2011,¹³ and Cox engineers report that KSQA's signal has been available only intermittently since then.¹⁴ The likelihood of any consumer confusion therefore is exceedingly small.¹⁵

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Commission though its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules. Otherwise, the practice of administrative law would come to resemble 'Russian Roulette.'"); *see also Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir 2000) (same).

¹⁰ *See Second DTV Report and Order*, 19 FCC Rcd 18279 at para. 153.

¹¹ *See, e.g., Associated Christian Television System, Inc.*, 25 FCC Rcd 9237, 9239 (Med. Bur. 2010) ("*Associated Christian*").

¹² *Id.* at 1-2.

¹³ *Id.* at 3-4.

¹⁴ Moreover, to the extent that KSQA has been transmitting Channel 12 as its PSIP major channel number since September 2011, it has done so in violation of the Commission's rules, which require it to broadcast PSIP information corresponding to its correct PSIP channel; namely Channel 22. *See* 47 C.F.R. §73.682(d); *see Associated Christian* at 9237 (ordering station to comply with the rules by commencing broadcasting on correct PSIP channel). Cox's most recent signal tests of KSQA indicate that the station is no longer inserting any channel mapping PSIP information in its broadcast air signal. This would constitute a further violation of the Commission's rules.

¹⁵ DISH's decision to carry KSQA on Channel 12 of its satellite system is irrelevant to the question of what PSIP channel KSQA is required to transmit or what channel position KSQA is entitled to demand as a "must-carry" broadcaster on Cox's cable system. *See* PSIP Request at 4.

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Given the absence of any precedent or equities supporting KSQA's request for immediate relief, if the Commission grants the PSIP Channel Change Request, it should be granted only prospectively, and KSQA's right to demand carriage on Channel 12 should only become effective, if at all, for the must-carry period beginning January 1, 2015. The pending proceedings notwithstanding, Cox notes it has communicated repeatedly to KSQA that Cox remains willing to commence carriage of KSQA on a mutually agreeable channel.

Respectfully submitted,



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In addition, KSQA's citation to *Associated Christian* as a case granting a PSIP channel change based on "consumer interference" is simply wrong. In that case, the broadcaster argued that consumers would be confused unless a PSIP channel change was granted because the station would have different over-the-air and channel cable placements. The Commission rejected that argument and denied the PSIP change request. 25 FCC Rcd at 9238-39.